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Nos. 06-84 & 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*, *Petitioners*,

v.

CHARLES BURR, *et al.*, *Respondents*.

GEICO GENERAL INSURANCE COMPANY, *et al.*, *Petitioners*,

v.

AJENE EDO, *Respondent*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a defendant can be found liable for a "willful" violation of the Fair Credit Reporting Act upon a finding of "reckless disregard" for the FCRA's requirements, absent a finding that the defendant knew its conduct violated the FCRA.

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INTEREST OF AMICUS CURIAE[1]

The American Insurance Association (AIA) is a national trade association representing companies writing property and casualty insurance in every state and jurisdiction of the United States. AIA members underwrite over $120 billion in premiums each year and provide coverage in a broad range of personal and commercial lines of business. AIA regularly appears in judicial proceedings to inform courts about the implications of legal developments for its members. AIA participated in the Ninth Circuit, and at the certiorari stage in this Court, as amicus curiae in support of Petitioners.

Overturning the Ninth Circuit's interpretation of the Fair Credit Reporting Act (FCRA) is extremely important to AIA members. The Ninth Circuit's construction of the decades-old statute as imposing requirements on insurance companies that no court previously recognized, and its indication that defendants might be found liable for "willfully" violating these unprecedented requirements, despite their good-faith compliance efforts, threaten AIA members with substantial and severe liability.

STATEMENT

In the 1990s, many insurers began using credit-based insurance scores—scores derived from credit report information—in underwriting and pricing personal lines of insurance. The use of such scores enables insurers to rate insurance risks more accurately and, thus, to avoid subsidization by some consumers of the higher risks presented by other consumers. The more accurate classification of risk translates into lower premiums for many consumers and increased availability of coverage.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amicus curiae states that no counsel for a party authored this brief in whole or in part. No person or entity, other than amicus curiae and its members, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties.

The FCRA requires an entity that "takes any adverse action . . . based in whole or in part on any information contained in a consumer report" to issue an adverse-action notice to the affected consumer. 15 U.S.C. § 1681m(a). Each insurance company using insurance scores made a determination of what triggered its FCRA duty to provide adverse-action notices. Separate determinations made by different insurers, often on advice of counsel, resulted in various practices. Given the absence of any court decisions interpreting the FCRA's insurance adverse-action definition—15 U.S.C. § 1681a(k)(1)(B)(i)—or any binding agency regulations, insurers conformed their practices to their good-faith interpretations of the FCRA's text and any applicable state-law requirements.

Many insurers reasonably determined that the FCRA did not require adverse-action notices upon the setting of an initial rate for insurance and, accordingly, for a number of years, did not provide notices in such circumstances. Few, if any, insurers construed the FCRA to require adverse-action notices in the broad "best rate" circumstances now required by the Ninth Circuit—*i.e.*, whenever an insurer's consideration of a consumer's insurance score leads the insurer to set a higher insurance rate than the insurer would have set had it considered a hypothetical consumer with a top insurance score. Rationally construing the statute, many insurers instead determined the adverseness of using a consumer's credit report by isolating that use and its effect on a consumer's rate. In other words, insurers sought to identify when their use of a consumer's insurance score led them to set a higher insurance rate than would have been set had they not considered the score at all, and then issued adverse-action notices in those circumstances. It would have contradicted common sense to adopt the "best rate" construction and notify numerous consumers that they had been adversely affected when consideration of their insurance scores either had not affected their rates or had led to lower rates.

Many insurance company groups operate in an economically efficient, integrated fashion, in which a separate and distinct corporate entity provides centralized insurance, financial, technological, and management services to affiliated issuing insurers through written agreements. Often, this separate corporate entity obtains consumers' insurance scores and applies previously established rating criteria to determine an appropriate premium. Sometimes, a consumer's rate is affected by the placement of the consumer with one of several insurer affiliates within an integrated company group (where the affiliates offer different rating levels). Amicus knows of no company that believed, prior to the Ninth Circuit's decision, that entities other than the affiliated insurer that actually issued the relevant policy (or the affiliated entity that was responsible for denying coverage for the integrated company group altogether) must issue adverse-action notices.

In 2001 and 2002, a group of consumers initiated eight putative nationwide class actions in federal district court, alleging that Petitioners' and other insurers' adverse-action notice practices contravened the FCRA's requirements.[2] The complainants did not allege that they had suffered any actual damages, which a plaintiff must show to recover for a "negligent" violation of the FCRA. 15 U.S.C. § 1681o. Instead, the complainants sought the extraordinary remedy of statutory and punitive damages under § 1681n, which states that "[a]ny person who *willfully* fails to comply with any requirement imposed under [the Act] with respect to any consumer is liable to that consumer" for statutory damages of

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[2] *Ashby* v. *FICO*, CV 01-1446-BR (filed Sept. 28, 2001); *Willes* v. *State Farm Fire & Casualty*, CV 01-1457-BR (filed Oct. 1, 2001); *Spano* v. *Safeco Ins. Co. of Or.*, CV 01-1464-BR (filed Oct. 2, 2001); *Dikeman* v. *Progressive Corp.*, CV 01-01465-BR (filed Oct. 2, 2001); *Razilov* v. *AMCO Ins. Co.*, CV 01-1466-BR (filed Oct. 3, 2001); *Rausch* v. *Hartford Fin. Servs. Group*, CV 01-1529-BR (filed Oct. 16, 2001); *Mark* v. *Valley Ins. Co.*, No. CV01-1575-BR (filed Oct. 24, 2001); *Edo* v. *GEICO Cas. Co.*, CV 02-678-BR (filed May 24, 2002).

$100 to $1000, punitive damages, and attorneys fees. 15 U.S.C. § 1681n(a) (emphasis added).

The district court, addressing questions of national first impression, concluded in one of the cases that only the insurance affiliate to which a consumer applies can "take" an adverse action and therefore incur an obligation to issue a notice. *Willes* v. *State Farm Fire & Cas. Co.*, CV 01-1457-BR (D. Or. Sept. 9, 2003), *reprinted in* Pet. App., *State Farm Mut. Auto. Ins. Co.* v. *Willes*, No. 06-101, at 74a-75a (U.S. filed July 19, 2006). In another case, the court held that an "adverse action" does not occur when an insurer, on the basis of information in a consumer's credit report, sets an initial rate that is higher than the best available rate. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1318-1319 (D. Or. 2003). And, in yet another case, the court held that, at a minimum, no adverse action occurs when an insurer sets a rate that is the same as the rate it would have set had the consumer's credit report not been considered. *See* GEICO Pet. App. 39a, 46a. On appropriate motions, the court granted summary judgment to the insurers. At the time, the district court's decisions on these questions were the first and only reported opinions addressing the application of the FCRA's adverse-action notice requirement in this insurance context. *See id.*; *Spano* v. *SAFECO Ins. Co.*, 215 F.R.D. 601 (D. Or. 2003); *Ashby* v. *Farmers Group, Inc.*, 261 F. Supp. 2d 1213 (D. Or. 2003); *Razilov* v. *Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977 (D. Or. 2003).

Respondents in the two cases at bar, and the plaintiffs in the other similar cases, appealed to the Ninth Circuit. After three tries, spanning a five-month period during which the Ninth Circuit amended its decision twice in response to petitions for rehearing, the court of appeals reversed and remanded.

In its first try—an opinion issued August 4, 2005—a divided Ninth Circuit panel reversed the district court on each

of the FCRA issues described above.[3] In particular, the court of appeals held that an adverse action occurs when an insurer sets an initial rate that is higher than the rate the consumer would have been offered if his credit score had been better, and that any insurance entity with any relation to a rate or coverage decision for that consumer is obligated to send an adverse-action notice. Pet. App. 48a-54a, 57a-60a.[4]

The Ninth Circuit also rejected Petitioners' arguments that they were entitled to summary judgment because any alleged noncompliance could not have been "willfu[l]" under § 1681n. Pet. App. 65a-66a. The court construed the "willfulness" standard to encompass not only "conscious disregard" of known legal obligations, but also "recklessness." *Id.* at 62a. The court further found that a defendant may act "recklessly" if it adopts "unreasonable answers to issues of first impression" under the FCRA. *Id.* at 64a. Two members of the panel went further, concluding (apparently as a matter of law) that Petitioners' interpretations had been so "objectively unmeritorious" that they were reckless, and thus willful. *Id.* at 64a-65a. The panel majority did not explain how its conclusion could account for the fact that the district court—another Article III tribunal—had concluded that the FCRA "unambiguous[ly] and plainly" supported Petitioners' constructions of the statute. *Mark*, 275 F. Supp. 2d at 1318. Judge Bybee dissented, explaining that he "would not decide, as a matter of fact or law, that the insur-

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[3] The Ninth Circuit issued its primary decision in two consolidated cases—*Reynolds* v. *Hartford Financial Services Group, Inc.*, No. 03-35695, and *Edo* v. *GEICO Casualty Co.*, No. 04-35279. The court then resolved the appeal of Petitioner Safeco in an unpublished disposition, relying on the decision in the consolidated *Reynolds* and *Edo* cases. This brief uses the term "decision below" to refer to the Ninth Circuit's third decision under the consolidated *Reynolds* and *Edo* caption. *See infra* pp. 6-7.

[4] In this brief, citations to the "Pet. App." are to the Appendix to the Petition for Certiorari for Safeco Insurance Company unless otherwise indicated.

ance companies acted willfully" without further examination of that question. Pet. App. 67a-68a.

Joined by several amici, including the AIA, Petitioners sought rehearing en banc, noting that the Ninth Circuit's holding that adherence to an "unreasonable" legal interpretation may constitute willful noncompliance directly contradicted decisions of this Court. *See, e.g.*, Br. for Amici Curiae AIA and NAMIC in Support of Pet. for Reh'g En Banc 5-6 (citing *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988) (rejecting the proposition that "a finding of unreasonableness [would] suffice as proof of" willfulness), and *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 616 (1993)). In response, the Ninth Circuit issued an amended opinion that reached the same result but, without explanation, removed the words "reasonable" and "unreasonable" from its first decision and replaced them with the synonyms "tenable," "indefensible," and "implausible." Pet. App. 69a-99a. Judge Bybee again dissented. *Id.* at 99a-101a.

Petitioners once more sought rehearing en banc, and the Ninth Circuit issued another amended opinion. In its third try, the court retreated from its *sua sponte* finding that Petitioners had acted in willful noncompliance, instead remanding to the district court to decide whether Petitioners had "willfully" violated the FCRA. Pet. App. 129a. The court appeared to set forth a two-step framework for addressing that question under its "recklessness" standard: First, a court should determine whether a defendant adopted an interpretation of the FCRA that the court (in hindsight) finds "implausible." *Id.* If so, the court must then examine the "obviousness or unreasonableness of the erroneous interpretation" and, "[i]n some cases," "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* The Ninth Circuit noted that it found "some" of Petitioners' FCRA interpretations "implausible," without further specification, thus requiring the additional "recklessness" inquiry on remand. *Id.* The Ninth Circuit did not, however, specify how the district court should apply or otherwise employ the "un-

reasonableness" or "company[] decision" factors, what weight should be accorded each, or when examination of the second is even appropriate.

SUMMARY OF ARGUMENT

The decision below adopts an erroneous interpretation of the term "willfully" as used in 15 U.S.C. § 1681n(a). Amicus urges this Court to correct that construction for two primary reasons.

First, the Ninth Circuit's construction of the willful noncompliance provision as imposing a broad and loosely defined "recklessness" standard departs severely from the text and purpose of § 1681n(a). The true content and contours of the Ninth Circuit's "recklessness" standard can best be gleaned from the court of appeals' application in these very cases. The Ninth Circuit held that a court may find a defendant to have recklessly disregarded the FCRA even in circumstances where all of the following are true: (1) the text of the FCRA supports the defendant's construction or is at least ambiguous on the relevant issue; (2) the defendant construes the statute without the benefit of judicial precedent or binding agency determinations interpreting the statute's application to the relevant issue; (3) the defendant adopts a reasonable construction of the statute, which is later adopted by the first federal court to consider the relevant issue; and (4) the first court to construe the statute differently is the court of appeals in the very case challenging the relevant practice as a willful statutory violation, and the court of appeals does so only because it settles upon a novel interpretation of the relevant FCRA provision. As a result, instead of properly confining statutory and punitive damages under § 1681n(a) to egregious violations of the FCRA, the Ninth Circuit's "recklessness" construction authorizes the award of extraordinary damages even in cases in which a defendant's construction of the statute is objectively reasonable.

Second, the "recklessness" standard threatens substantial harm to the insurance industry. If allowed to stand, the

decisions below will authorize the imposition of staggering, class-based statutory and punitive damages in cases where consumers do not even claim to have suffered any actual damages. The potential damage awards would have severe consequences for insurers and consumers alike. Moreover, because questions of first impression regarding the FCRA may frequently arise in other insurance contexts, insurers will face the threat of similarly costly class-action litigation and liability for any interpretation of the Act that a court later deems "implausible." The Ninth Circuit's erroneous interpretation will also affect the many other businesses that routinely make use of consumer credit information. It is critical that this Court overturn the Ninth Circuit's interpretation to protect personal-lines insurers and other businesses from substantial damages that Congress never intended to impose.

ARGUMENT

I. THE NINTH CIRCUIT'S CONSTRUCTION OF "WILLFULLY" IN 15 U.S.C. § 1681n(a) AS IMPOSING BROAD AND LOOSELY-DEFINED RECKLESSNESS LIABILITY IS ERRONEOUS

A. The FCRA "Willful Noncompliance" Provision Limits Statutory And Punitive Damages To Egregious Violations Of The Act

Congress provided individuals with two primary private remedies for a defendant's violation of the FCRA. First, individuals may recover actual damages and reasonable attorneys fees for a defendant's "negligent noncompliance." 15 U.S.C. § 1681o. Second, in the more egregious circumstances where a defendant "*willfully* fails to comply" with the statute, Congress authorized a private right of action to recover statutory damages of $100 to $1000, punitive damages, and reasonable attorneys fees. *Id.* § 1681n(a).[5] The statutory text thus reserves the more substantial damages for those defendants whose culpability is most significant.

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[5] The FCRA also separately authorizes government enforcement of statutory requirements. *See* 15 U.S.C. § 1681s.

AIA concurs with the position taken by the majority of the courts of appeals—that Congress intended to limit liability under § 1681n(a) to those who "knowingly and intentionally commit[] an act in conscious disregard for the rights of the consumer." *Ausherman* v. *Bank of Am. Corp.*, 352 F.3d 896, 900 (4th Cir. 2003).[6]

As Petitioners persuasively demonstrate, the legislative history demonstrates that Congress deliberately chose a narrow scope for the "willful noncompliance" provision, rejecting alternative legislative drafts that would have permitted the recovery of statutory and punitive damages for a broader scope of conduct—*i.e.*, both grossly negligent and willful violations. *See* H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970); *see also* Safeco Pet. Br. 25-26; GEICO Pet. Br. 33. The "knowing[] and intentional[]" construction both adheres to the statutory text and best reflects Congress's purpose in creating two separate private rights of action, in which the most substantial damages (and the *only penalties*) are reserved for the most culpable defendants. Congress intended less culpable transgressions, like those alleged to have occurred in these cases, to be remedied by private actions for "negligent noncompliance" or enforcement actions—not through the imposition of staggering, class-based statutory and punitive damages.

B. The Erroneousness Of The "Recklessness" Construction Is Apparent In The Ninth Circuit's Application Of The Standard

The true content and contours of the "recklessness" construction—and its danger—can best be discerned from the Ninth Circuit's application of the standard in these cases. Under that construction, statutory and punitive damages

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[6] *See also, e.g.*, *Wantz* v. *Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357, 368 (8th Cir. 2002); *Cousin* v. *Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Casella* v. *Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995); *Zamora* v. *Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1369 (10th Cir. 1987) (*per curiam*).

would not be reserved for only the most culpable violations of the FCRA, as Congress intended, but rather could be imposed in even the most blameless of circumstances.

According to the Ninth Circuit, a defendant can "willfully" violate an FCRA statutory provision under its "recklessness" construction even where, as here, all of the following are true: (1) the text of the FCRA supports the defendant's construction or is at least ambiguous on the relevant issue; (2) there are no existing judicial decisions or binding agency regulations interpreting the FCRA to guide the defendant to a particular construction; (3) the defendant adopts a reasonable construction that is later adopted and confirmed by the first federal district court to consider the question; and (4) the defendant is subsequently found to have violated the statute only because it did not adopt a novel and unforeseeable construction of the statute, first announced in an appeal in the very case seeking statutory and punitive damages for the alleged willful noncompliance. Imposition of statutory and punitive damages in these circumstances is entirely inconsistent with the text and purpose of § 1681n(a).

1. Petitioners Could Not Have Willfully Violated The Adverse-Action Requirement By Determining Not To Send Notices Upon The Setting Of An Initial Insurance Rate

The Ninth Circuit's first departure from the text and purpose of § 1681n(a) is apparent in its conclusion that Petitioners could have "willfully" violated the FCRA by interpreting the adverse-action notice requirement not to apply to the setting of initial insurance rates.

The FCRA requires "users of consumer reports," including insurers, to provide notice to a consumer of "any adverse action . . . based in whole or in part on . . . a consumer report." 15 U.S.C. § 1681m(a)(1). An "adverse action" in the insurance context, in turn, is defined as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connec-

tion with the underwriting of insurance." *Id.* § 1681a(k)(1)(B)(i). The Ninth Circuit held that the establishment of an initial rate is covered by the statutory phrase "'increase in any charge' . . . for insurance." Pet. App. 114a. In particular, the court concluded that an insurer "increase[s]" a "charge" for insurance, based on a credit report, when the insurer "charg[es] a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report." *Id.* (emphasis added).

The Ninth Circuit's reading is contrary to the plain meaning of the statutory text. The court recognized that "'[i]ncrease' means to make something greater." Pet. App. 114a. Yet one cannot make "something" greater if that "something"—here a rate for the consumer—does not yet exist. This is not only the natural use of "increase," but also the way numerous courts, including the Ninth Circuit itself, previously have used the term.[7]

The Ninth Circuit rejected this customary meaning of "increase" based on a phrase found later in the "adverse action" definition: "any insurance, existing or applied for." The court assumed that Congress intended each of the various actions described in § 1681a(k)(1)(B)(i)—*e.g.*, "denial," "increase"—to modify both "existing" and "applied for" insurance. Pet. App. 115a.

That assumption is erroneous. The Ninth Circuit's reading ignores the reality that most of the actions described in § 1681a(k)(1)(B)(i) make sense only when read to modify either "existing" or "applied for" insurance, but not

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[7] *See Certain Underwriters at Lloyd's* v. *Montford*, 52 F.3d 219, 221 (9th Cir. 1995) ("The insured value . . . was initially set at $925,000, and was [later] increased to $1,050,000[.]"); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 558 (1962) (plurality op.); *Bernklau* v. *Principi*, 291 F.3d 795, 798 (Fed. Cir. 2002); *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1016 (10th Cir. 2002); *United States* v. *Schallom*, 998 F.2d 196, 199 (4th Cir. 1993) (*per curiam*); *United States* v. *Golden*, 954 F.2d 1413, 1415 (7th Cir. 1992).

both. For example, "cancellation" naturally modifies only "existing" insurance, as in the cancellation of an existing insurance policy based on information learned from a customer's credit report. One cannot "cancel" something that does not exist. The term "denial," on the other hand, naturally modifies only insurance that a consumer has "applied for," as in the denial of an application for insurance based on information in the applicant's credit report. Thus, insurers could reasonably interpret § 1681a(k)(1)(B)(i) as requiring notices for

- a "denial" of an "appli[cation]" for insurance,
- a "cancellation" of "existing" insurance,
- an "increase in any charge for . . . existing" insurance, or
- "a reduction or other adverse or unfavorable change in the terms of coverage or amount of . . . existing" insurance.

By stretching the term "increase" to modify both "existing" and "applied for" insurance, the Ninth Circuit effectively interpreted "increase" to mean establishing an insurance "charge" that does not yet exist and doing so at a level higher than might have been set under different circumstances. That reading strains the straightforward reading of the term.

The insurers' and district court's interpretation of the adverse-action notice requirement not to apply to the establishment of initial rates is far more faithful to the statutory text. Nevertheless, even were the Ninth Circuit correct, it stretches the willful noncompliance provision of § 1681n(a) beyond its properly limited sphere to hold that the contrary interpretation reached by the insurers and the district court amounts to a willful failure to comply with the FCRA. Insurers adopted their good-faith construction of the ambiguous adverse-action definition in the absence of any judicial precedent or binding agency regulations on the issue. Their interpretation in that context was more than reasonable, as demonstrated by the history of these cases. The district

court, in the first reported opinion to confront the issue, *agreed* with the insurers. *See Mark*, 275 F. Supp. 2d at 1318-1319. The Ninth Circuit's finding that a "recklessness" (and thus, willfulness) finding could be justified in these circumstances persuasively demonstrates why the "recklessness" construction of § 1681n(a) cannot be correct.

2. Petitioners Could Not Have Willfully Violated The Adverse-Action Requirement By Determining Not To Send Notices To All Persons Receiving Less Than The Best Rate

The Ninth Circuit's next departure is apparent in its conclusion that Petitioners could have "willfully" violated the FCRA by interpreting the adverse-action requirement differently from the Ninth Circuit's novel "best rate" construction. That "best rate" construction is not only far from obvious, it is in fact erroneous.

The text of the FCRA makes plain that a change in the terms of insurance is "adverse" if, as a result of the use of a credit report, the consumer is placed in a worse position. "Adverse" is commonly understood to mean "contrary to one's interests or welfare; harmful or unfavorable." *The American Heritage Dictionary of the English Language* (3d ed. 1992). Based on this ordinary meaning, many insurers reasonably interpreted the FCRA to require an adverse-action notice only when they set a rate, upon consideration of a consumer's credit report, higher than the rate they would have set had they not considered the consumer's credit report in the first instance.

The Ninth Circuit took a different view. The court held that an insurer must send an adverse-action notice in substantially broader and different circumstances—namely, "whenever a consumer pays a higher rate *because his credit rating is less than the top potential score.*" Pet. App. 118a (emphasis added). This "best rate" construction finds no support in the FCRA's text. The statute nowhere directs insurers to determine adverseness by comparing the use of a consumer's credit score to the use of a hypothetical "top potential score."

Under the Ninth Circuit's novel construction, the statute would counterintuitively require insurers to notify consumers that they were adversely affected by the use of their credit reports even if that use helped them, simply because it did not help them as much as use of a hypothetical "top" credit report would have. The Ninth Circuit's interpretation flies in the face of common sense. Congress could not have intended for insurers to misinform consumers receiving better insurance rates, by virtue of the insurers' use of the consumers' credit reports, that the consumers instead had been adversely affected by that use.

Recent congressional action confirms the Ninth Circuit's error. In 2003 Congress amended the FCRA to require creditors (but not insurers) to provide a separate "risk-based-pricing" notice to a consumer when the use of credit-report information results in an offer with "material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers." Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 311(a), 117 Stat. 1952, 1988 (codified at 15 U.S.C. § 1681m(h)(1)). This new provision specifies a baseline against which a creditor must measure the effect that use of credit-report information has had, and requires the creditor to provide a new type of notice to consumers when the creditor offers material terms that are below that baseline. Notably, the baseline is not the "best rate" available, as it is for the Ninth Circuit's interpretation of the adverse-action requirement. The 2003 amendment demonstrates that Congress knew how to link an FCRA notice requirement to the setting of a rate that is not as favorable as rates offered to other consumers. The FCRA's insurance-specific, adverse-action definition lacks any such language. The Ninth Circuit's construction would hold insurers to a higher standard than lenders, even though the only clear FCRA textual requirement for the provision of notices in this context is the risk-based pricing provision for lenders added by the 2003 FCRA amendments.

For the foregoing reasons, the Ninth Circuit's "best rate" construction is plainly erroneous. At a minimum, that construction was far from foreseeable, such that insurers' adoption of a contrary view could be termed "willful non-compliance" with the FCRA. Prior to the decision below, no court or binding agency regulation had construed the FCRA in the same way. The Ninth Circuit's determination that Petitioners could be subject to liability for statutory and punitive damages for not predicting the court's construction stretches § 1681n(a) far beyond the limited sphere envisioned by Congress.

3. Petitioners Could Not Have Willfully Violated The Adverse-Action Requirement By Determining That It Did Not Apply To Affiliates Who Neither Issue The Relevant Insurance Policy Nor Deny The Relevant Insurance Coverage

The Ninth Circuit also departed from the text and purpose of § 1681n(a) in concluding that certain insurance affiliate defendants—who neither issued, denied nor canceled the relevant insurance coverage—could have "willfully" violated the FCRA by not sending adverse-action notices.

There is no dispute that, if insurers act adversely on the basis of credit information, the FCRA requires that a notice of that adverse action to be sent to the affected consumer. But when a consumer submits an application to one of several affiliated entities, only the entity that issues the relevant insurance policy (and thus, for example, "charge[s]" a customer for insurance or "cancel[s]" that insurance) or the entity that "deni[es]" insurance coverage "takes" one of the "adverse actions" specified in § 1681a(k)(1)(B)(i). Only that entity is therefore required by the FCRA to send the consumer an adverse action notice. The Ninth Circuit erred in exposing additional insurer affiliates to liability if they do not send their own additional notices to the consumer or list themselves in a single, global notice. The court cast this unjustifiably wide net of liability by holding that any entity with any theoretical connection to an insurance rating decision "takes" an "adverse action" within the meaning of

§ 1681m(a), and therefore must provide an adverse-action notice to the affected consumer.

The Ninth Circuit's conclusion was based primarily on an incorrect piecing together of disparate statutory sections. The court emphasized two phrases: "any person" in § 1681m(a), and "in connection with the underwriting of insurance" in § 1681a(k)(1)(B)(i). The Ninth Circuit apparently believed that these phrases, if read together, reveal congressional intent to require any person with any theoretical connection to the purported adverse action to issue an adverse-action notice. *See* Pet. App. 122a. The terms are found in different statutory provisions, however, and there is no indication that Congress intended the meaning the Ninth Circuit adopted.

The Ninth Circuit also purported to ground its construction in the FCRA's purposes, but its ruling would disserve those very purposes. A single notice, provided by any single entity, is sufficient to alert a consumer that consideration of her credit report contributed to an adverse action. Requiring every insurance entity with any theoretical connection to the purported adverse action to issue additional notices, or requiring every such additional entity to be listed in a single notice, does nothing to enhance the consumer's understanding. In fact, such a requirement is likely only to confuse. Under the Ninth Circuit's holding, consumers must receive multiple notices from numerous insurance entities (or a single notice listing numerous such entities) with whom they have never had any interaction. Faced with flurries of such notices, many consumers likely would ignore them altogether. *See The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Comm. On Banking, Housing, and Urban Affairs*, 108th Cong. 95-96 (2003) (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) ("notices [given] too widely and in too many circumstances" can become "something that people ignore"). Such an outcome would be contrary to the FCRA's objectives.

Ultimately, the Ninth Circuit grounded its interpretation in reasoning that resembles the type of rulemaking that is not properly the province of an Article III court. Yet, as a court deciding a case or controversy, the Ninth Circuit did not provide interested parties the notice or opportunity for comment that would have accompanied a true administrative rulemaking. The court based its expansion of the adverse-action requirement on its conjecture that consumers probably do not "understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure." Pet. App. 124a. The court then asserted—without reference to statutory text, structure or legislative history—that Congress intended the FCRA to remedy this assumed lack of knowledge "[b]y imposing joint and several liability" on all insurance entities tangentially related to an insurance rating decision. *Id.*; *see id.* ("By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy."). From that speculative re-creation of congressional intent, the Ninth Circuit then fashioned from whole cloth new obligations that no court or agency had ever imposed.

The Ninth Circuit's novel interpretation was neither obvious nor correct. For this reason, the court's further holding that Petitioners' failure to predict the construction could support an award of statutory and punitive damages stretches the § 1681n(a) "willful noncompliance" provision beyond its intended coverage. Absent any judicial decision or binding agency regulations, Petitioners read the statute precisely as the first federal court to take up this issue did—the district court's decision in these cases. *See Razilov*, 242 F. Supp. 2d at 991.

4. Petitioners Could Not Have Willfully Violated The Adverse-Action Requirement By Sending Notices Satisfying The FCRA's Text, But Not The "Minimum" Requirements In The Ninth Circuit's Decision

The Ninth Circuit's final error is apparent in its finding that Petitioners could have "willfully" violated the FCRA by sending adverse-action notices that, in retrospect, did not accord with the court of appeals' newly announced "minimum" requirements for the content of such notices.

The Ninth Circuit acknowledged that the FCRA does not define the term "notice of an adverse action." Pet. App. 121a. The court nonetheless created its own rules—without urging by any party or amici, and without the benefit of briefing—respecting the information that must be included in such an adverse-action notice. *See id.* Significantly, the Ninth Circuit relegated the requirements that Congress and the Federal Trade Commission prescribed to a footnote, and supplemented the statutory language with additional requirements that the court deemed important. *See id.* & n.13. Thus, based on little more than its own conceptions of good policy, the court held that an adverse-action notice must "at a minimum," (1) "describe the action," (2) "specify the effect of the action upon the consumer," and (3) "identify the party or parties taking the action, and their respective roles." Pet. App. 121a.

No prior notice of these "minimum" requirements existed in either judicial precedent construing the adverse-action requirement or binding agency interpretations. In fact, most insurers could not have complied with the first and third requirements because, prior to the court of appeals' decision, it had not been contemplated that an insurer takes an "adverse action" in the "best rate" circumstances identified by the Ninth Circuit or that insurance affiliates that neither issue an insurance policy, cancel an insurance policy, nor deny coverage could be deemed to "take" an "adverse action."

* * *

The Ninth Circuit's application of the "recklessness" construction of § 1681n(a) in each of the four instances described above persuasively demonstrates why that construction should be rejected in favor of the view taken by the majority of the courts of appeals. By construing the term "willfully" to cover conduct that—for the reasons explained above—does not even qualify as "negligent," the Ninth Circuit's construction turns Congress's intent on its head. AIA respectfully submits that the Court should hold that one "willfully" violates the FCRA not through "recklessness," but only by knowingly and intentionally committing an act in conscious disregard for known legal rights of a consumer. Under that standard, it is indisputably clear that Petitioners cannot be subject to liability under § 1681n(a).

II. THE NINTH CIRCUIT'S HOLDING WOULD HAVE A SUBSTANTIAL, DAMAGING IMPACT ON THE INSURANCE INDUSTRY

The issues the Ninth Circuit addressed have substantial importance not just to the parties, but to all of the insurance industry, many of whose members interpreted the Act much as Petitioners did. The conclusions in the decision below expose insurers to statutory damages in situations that Congress did not intend, and to punitive damages even when they have sought in good faith to comply with the FCRA, including by seeking counsel's advice. This exposure threatens significant liability, with broad ramifications for the industry's ability to perform its important functions. Amicus estimates that since the beginning of 2001, more than 150 million new personal lines insurance policies have been written. Conservatively estimating that adverse-action violations might be found for half of those policies under the Ninth Circuit's incorrect constructions of the Act, the potential liability is staggering—particularly since the FCRA, unlike the Truth In Lending Act, does not impose a cap on total statutory damages available in class-action litigation. *Compare* 15 U.S.C. § 1681o(a)(1), *with id.* § 1640(a)(2)(B). Significantly, the Ninth Circuit decision sets the stage for these astronomical statutory damage awards, and for puni-

tive damage awards, in cases where consumers do not even allege that they suffered any actual damages. The decision below threatens to have a substantial and real impact on the operations of AIA's members. By removing enormous amounts of capital from the insurance system, such awards would inevitably harm the insurance marketplace.

In addition, the Ninth Circuit's decision has ramifications that extend beyond the specific issues addressed below. The FCRA intersects with the business of insurance in numerous ways. *See, e.g.*, 15 U.S.C. §§ 1681a(*l*), 1681b(a)(3)(C), 1681c(b), 1681m(d). If the Ninth Circuit's "reckless disregard" standard remains the law, insurers will face the prospect of severe class-action liability whenever a court might later decide (in hindsight) that insurers' answers to unsettled FCRA questions were "implausible." The nature of the FCRA is such that any single interpretation of an FCRA requirement frequently affects millions of transactions yearly. If a court later decides that adherence to such an interpretation was reckless, statutory damages of $100 to $1000 might be available for each of the millions of affected consumers, as well as punitive damages, resulting in potentially enormous liability. That result frustrates the very purposes the FCRA was designed to further. This effect is compounded by the Ninth Circuit's creation of an entirely novel standard for adjudicating a party's "willfulness" based on terms like "untenable," "creative," "implausible," and "indefensible." Those words carry no established meaning in other legal contexts, and only the Ninth Circuit knows their intended meaning here. The result is an unknown, unknowable standard that provides regulated parties no useful guidance.

CONCLUSION

The Court should reverse the judgments below and hold that, as a matter of law, Petitioners did not, and could not have, willfully violated the FCRA adverse-action requirement.

Respectfully submitted.

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